United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

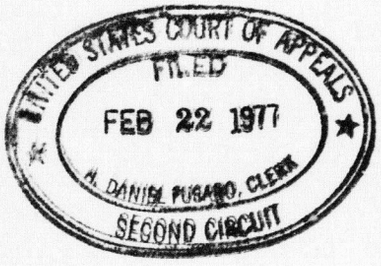
76-7634

B P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



RENE SOCKWELL, A MINOR, ET AL
Plaintiff-Appellees

v.

FRANCIS MALONEY, ET AL
Defendant-Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANTS

CARL R. AJELLO
Attorney General
30 Trinity Street
Hartford, Connecticut

FRANCIS J. MAC GREGOR
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Federal Cases Cited:

Page

Federal Statutes Cited:

Federal Regulations Cited:

Page

State Statutes Cited:

ISSUES

Although the issues and facts underlining this civil action will be explored in more detail later in this Brief, it may be of help to the Court to state in capsule form what this Appeal is and is not about.

Simply stated, the plaintiffs, who were judicially committed by the Juvenile Court to the custody of the defendant, Francis Maloney, were being supported on a wholly financed State foster-care program. During part of the time that they were on foster care, they were eligible for the federally matched Aid to Families with Dependent Children-Foster Care (hereafter called AFDC-FC) Program as promulgated in 42 U.S.C. 608, but due to an oversight, they remained on the State financed program.

Because the judicial commitment of the Juvenile Court was later terminated on an Appeal to the Superior Court by the plaintiffs' mother, the plaintiffs, without being given an evidentiary, pre-termination hearing,

were removed from foster care and on the same day of their removal put on AFDC, a program which paid lower benefits. At the same time, their Title XX (Social Services) benefits as foster care children terminated, but they were immediately eligible for the same Title XX benefits as recipients of the categorical AFDC program.

There is no question that the plaintiffs are entitled to a post-termination hearing pursuant to Section 17-2a of the Connecticut General Statutes, which statute requires a decision to be rendered within ninety (90) days of the date of request, and, in fact, the plaintiffs pursued this remedy.

The defendants concede that an AFDC-FC child, while remaining judicially committed, would be entitled to an evidentiary, pre-termination hearing pursuant to 45 C.F.R. 205.10, if he were put on AFDC. However, the defendants do not believe that a judicially committed foster-care child, whether on a fully State financed foster-care program or an AFDC-FC program, is entitled to a pre-termination hearing where the commit-

ment is judicially terminated, resulting in the child being immediately eligible and immediately receiving AFDC benefits.

The legal issues present in this case are:

1. Is a recipient of AFDC-FC benefits, or fully State paid Foster Care benefits, entitled to a Goldberg v. Kelly type of notice and an evidentiary, pre-termination hearing when these benefits are terminated as a result of the commitment being judicially terminated, and the Foster Care recipient is immediately eligible, and, in fact, immediately receives AFDC benefits paid at a lower rate, and is the denial of a Goldberg v. Kelly type hearing in this situation a denial of the Due Process Clause of the Fourteenth Amendment?

2. Is the recipient of AFDC-FC benefits, where there is federal financial participation, entitled to a pre-termination hearing pursuant to 45 C.F.R. 205.10 when the recipient has ceased to be judicially committed as the result of a Court determination; and as a result of said determination, is not statutorily entitled to AFDC-FC payments pursuant to 42 U.S.C. 608(a)?

3. Is a recipient of AFDC-FC benefits, who is also eligible at the same time for Title XX (Social Services) benefits, entitled to notice and a pre-termination hearing on termination of these benefits when, as an AFDC recipient, he will be immediately eligible for similar Title XX benefits?

FACTS

1. The four (4) plaintiffs, the Sockwell children, were voluntarily placed in the foster home of one Mary Scott under a voluntary placement as non-committed children on a wholly State financed foster-care program. (Appendix, page 39a. Stip. of Fact 1)

2. On May 16, 1974, the plaintiffs were judicially committed by the Juvenile Court to the custody of the defendant, Commissioner of Social Services, and on April 1, 1975, because the function of legal custody of the Social Service Commissioner was transferred by statute [Section 17-62(d) of the Connecticut General Statutes] to the Department of Children and Youth Services, the plaintiffs became committed to the custody of

the defendant, Commissioner of Children and Youth Services. (Appendix, page 39a. Stip. of Fact 2)

3. Because of this judicial commitment and the financial situation of the plaintiffs' parents, these children would have been eligible for AFDC-FC benefits pursuant to 42 U.S.C. 608, but due to department oversight, they remained on the fully State financed foster-care program. (Appendix, page 39a. Stip of Fact 3)

4. As foster-care children, the plaintiffs were immediately eligible to receive food stamps, Title XIX (Medicaid) and Social Services. (Appendix, page 48a)

5. Before the judicial commitment, the social services were delivered by Protective Services workers, and after commitment, these services were rendered by Children Services Social Workers, but the services for which the plaintiffs were eligible and actually received were substantially the same. (Appendix, page 48a)

6. On December 3, 1975, the Superior Court for New Haven County sustained an Appeal from the Juvenile Court taken by the plaintiffs' natural mother, which decision resulted in the children no longer being judicially

committed, and, as a result, the children were no longer eligible for AFDC-FC or State funded foster-care. (Appendix, pages 31a. 48a-49a, T18)

7. Elizabeth Phillips, the plaintiffs' next friend, knew on January 13, 1976, that the foster-care payments would probably have to be discontinued, and that Mary Scott, the foster mother, would have to apply for AFDC benefits. (Appendix, page 49a, T18)

8. On or about that date, Ms. Phillips requested by letter to the defendants that the department delay changing over the benefits from foster-care to AFDC. (Appendix, page 49a, T18, 19)

9. Sometime between December 3, 1975 and January 13, 1976, Tina Dixon, a department Social Worker, went to Mary Scott and told her of the Superior Court decision and that the result would be that foster-care payments would be stopped and that Mary Scott and the children should apply for AFDC. (Appendix, pages 49a-50a, T37, 38)

10. When the plaintiffs' foster-care payments terminated, they immediately started to receive AFDC payments with no time lapse between delivery of the checks. (Appendix, pages 21a-22a)

11. When the plaintiffs went on AFDC, they immediately were entitled to get Title XIX benefits to the same extent as on Foster Care, food stamp benefits to the same extent or higher because of the drop in income as on Foster Care, and the same type of social services under Title XX as was given under Foster Care. (Appendix page 48, T45)

12. Before Mary Scott became the foster parent of the plaintiffs, she had been on the AFDC Program with one (1) daughter for a period of approximately four (4) years, and she was able to get along on the AFDC payment. (Appendix, pages 51a-52a, T87, 88)

13. The plaintiffs were not denied school trips, and Mary Scott was able to pay for these trips out of AFDC funds. (Appendix, page 52a, T92, 93)

14. The lower Court made a finding in its Ruling of November 26, 1976, that none of the plaintiff children, since going on AFDC, had been "deprived of essential food, clothing or shelter...". (Appendix, page 28a)

15. After the plaintiff children had gone on AFDC, they made an admission in their Complaint that they were

found to be "thriving" and to be making "considerable progress". (Appendix, pages 5a, 10a)

16. Mary Scott requested a fair hearing pursuant to Section 17-2a of the Connecticut General Statutes by a letter dated April 6, 1976, and was given a hearing on June 21, 1976, with the Memorandum of Decision dated June 25, 1976, upholding the department. (Appendix, page 42a)

17. The finding of the Court that the plaintiff children could not go on trips was rebutted in the evidence, and the Court's finding of inability to go on vacations was a prediction as to a contingent future happening and did not deal with an event that had occurred. (Appendix, page 52a, T92, 93, 9)

18. The fully State financed foster-care program involves those cases where the parent voluntarily place their children, as non-committed children, in the care of the Commissioner of Children and Youth Services because of a temporary family crisis such as commitment of the mother to a mental facility or a hospital because of serious illness or in a judicial commitment situation where the family was not on AFDC or was not financially eligible for AFDC benefits.

ARGUMENT

The lower Court granted the plaintiffs request for a preliminary injunction in the present action based on the finding that the plaintiffs had made a clear showing of the likelihood of success on the merits and possible irreparable injury, or in the alternative, had raised sufficiently serious questions going to the merits to make a fair ground for litigation with a balance of hardship tipping decidedly towards the party requesting the relief. Sonesta International Hotels Corporation v. Wellington's Associates, 483 F.2d 247, 250 (1973); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323, cert. denied 394 U.S. 999 (1969).

It is defendants' claim in this Appeal that the plaintiffs, who bear the burden of clearly showing a good likelihood of success and irreparable injury, have not done so in respect to claiming a Due Process violation under the Fourteenth Amendment or the Supremacy Clause.

I

THE RECIPIENT OF FOSTER CARE BENEFITS, WHETHER AFDC-FC OR FULLY STATE FINANCED FOSTER CARE, IS NOT ENTITLED TO A GOLDBERG V. KELLY, 397 U.S. 254 (1970) TYPE OF EVIDENTIARY, PRE-TERMINATION HEARING ON TERMINATION OF FOSTER CARE AND TITLE XX BENEFITS WHEN THEY ARE IMMEDIATELY ELIGIBLE, AND, IN FACT, IMMEDIATELY RECEIVE AFDC BENEFITS WHICH ALSO AUTOMATICALLY ENTITLE THEM TO SIMILAR TITLE XX BENEFITS.

Although this Court should decide the statutory claims before getting into the constitutional issues, Schneider v. Whaley, 541 F.2d 916, 919 (1976), it would appear necessary in this case to decide the Due Process issue first because the lower Court did not limit the class injunctive relief to AFDC-FC plaintiffs but granted injunctive relief in all foster care situations which include wholly State financed foster care programs.

The Due Process issue in this case is whether a person, who, as a result of a judicial decision is entitled to foster care, has the right to a Goldberg

type hearing before his foster-care payments are terminated because the person has ceased to be judicially committed and where he is immediately eligible and, in fact, starts receiving AFDC benefits.

The defendants understand that the basis for allowing a hearing prior to termination in Goldberg was because the eligible recipient could be deprived "of the very means by which to live while he waits" for the decision to be reached, Goldberg, supra, page 264.

The question in this case is have the plaintiffs been deprived of the very means by which to live while awaiting a post-termination fair hearing decision pursuant to Section 17-2a of the Connecticut General Statutes. The answer is that they have not.

In the recent Supreme Court decision of Mathews v. Eldridge, 44 L.W. 4224, the Court, in denying the petitioner a pre-termination hearing involving Title II disability benefits, gave as one reason for the denial the possibility of getting other resources, including other types of federal assistance, while waiting for a determination of the case. Mathews, supra, page 4231.

In the present case, the plaintiffs' foster care benefits were terminated on May 15, 1976, and their AFDC benefits immediately commenced on May 15, 1976. They did not, as in Mathews, have to worry about the possibility of even seeking other aid. Aid was immediately available; and with this AFDC, the plaintiffs were immediately eligible for Title XIX, food stamp benefits, and many of the same Title XX benefits that had been available to them as foster-care recipients. Therefore, the "brutal need" test of Goldberg is not met in this present action. Goldberg, supra, page 261.

In fact, the lower Court made a finding that the plaintiffs were not "deprived of essential food, clothing and shelter...". (Appendix, page 28a) The only loss found by the lower Court was an inability to buy new clothes, go on school trips or summer vacations which "gave them a growing sense of dissatisfaction and insecurity in the home." But this loss does not meet the test set forth in Goldberg v. Kelly wherein the recipients are deprived of the very means by which to live awaiting the final hearing decision.

In Connecticut, pursuant to Section 17-2a of the Connecticut General Statutes (as amended by P.A. 76-162), the department must make a final determination of the aggrieved person's claim within ninety (90) days from the date they receive the request for the hearing. This is considerably faster action than the petitioner would probably receive in the Mathews v. Eldridge situation. Mathews, supra, page 4231.

When one considers the fact that Mary Scott, the foster mother, lived for approximately four (4) years on AFDC as a family of two and "got along" (Appendix, pages 51a - 52a) , it is difficult to see, taking into consideration the economics in scale of large families as recognized in Dandridge v. Williams, 397 U.S. 471 (1970), that this family could not wait an additional ninety (90) days for the fair hearing decision when they were getting the same AFDC benefits as any other family in the New Haven area.

The second test, the risk of erroneous deprivation, as discussed in Mathews, supra, pages 4229-4232,

is considerably less in this present civil action than in the Mathews case, where the Court held that there would be no spector of questionable credibility and veracity in standard and unbiased medical reports by physician specialists as arise in typical welfare situations involving questions of fact and veracity.

In the present case the plaintiffs are not removed from foster care because of disputed questions of fact. They were removed from foster care because a Superior Court had revoked their judicial commitment on December 3, 1975. Once the Court had revoked the commitment, they were clearly not eligible for AFDC-FC payments pursuant to 42 U.S.C. 608(a) or under the wholly State financed foster care program for dependent and neglected children pursuant to Section 17-32 et seq. of the Connecticut General Statutes.

What question of disputed fact could the plaintiffs raise even if they had been entitled to a Goldberg type pre-termination hearing before an evidentiary hearing officer?

The only argument that could be raised is that the Juvenile Court made an error of fact and law in finding the children not neglected and, therefore, sustaining the appeal from the Juvenile Court. But Goldberg's main thrust is to protect procedural rights, and there is no claim by the plaintiffs that the appeal statutes in Connecticut from Juvenile Court commitments do not afford the plaintiffs Due Process protection or that Judge Rubinow's decision of December 3, 1975, was in error. It is patently ridiculous to have an administrative hearing in order to second guess a judicial decision.

The defendants believe that the law of Mathews v. Eldridge, as applied to the facts of the present case, disposes of the issue of Due Process on the question of an evidentiary hearing prior to termination of foster care benefits.

The rationale in Mathews is to be found in a long line of cases which were decided before Mathews reached the Supreme Court.

In Gonzales v. Vowell, 490 F.2d 495 (1974), a case where AFDC benefits were terminated without a prior hearing because of the plaintiff-widow's eligibility for OASDI (Title II) benefits, that Court held there was no Due Process violation and distinguished Gonzales from Goldberg in the same manner the defendants have done in the present case. See also Frost v. Weinberger, 515 F.2d 57, 61 (1975)(Second Circuit); Merriweather v. Burson, 439 F.2d 1092 (1971); Velazco v. Minter, 481 F.2d 573, 577 (1973); Daniel v. Goliday, 398 U.S. 73 (1970); Arnett v. Kennedy, 416 U.S. 134 (1934); and Schneider, supra, page 921.

The Due Process argument on termination of Title XX services without a prior hearing is equally without merit because the only difference in the Title XX services the plaintiffs would received under foster care than under AFDC would be the fact that a different social worker with a different title would come to see them.

Most Title XX services are given by provider agencies with the state agency merely aiding the recipient in the process of finding which service the recipient

might need or desire. However, on the constitutional issue, there was a strong doubt in the minds of the Schneider Court that denial of these types of services raised a constitutional issue. Schneider, supra, pages 921-922.

II

THE PLAINTIFFS DO NOT APPEAR TO BE ENTITLED TO A PRE-TERMINATION HEARING PURSUANT TO FEDERAL STATUTE AND FEDERAL REGULATIONS.

If this Court believes Goldberg rather than Mathews should set the Due Process standard in this civil action, it need go no farther and the plaintiffs should prevail in their right to a pre-termination hearing in both the AFDC-FC and wholly State financed foster-care situations.

On the other hand, if this Court believes Mathews is controlling, but a sufficient constitutional question has been raised to give the Court pendent jurisdiction on which to reach to reach the statutory question,

Andrews v. Norton, 385 F.Supp. 672, affirmed 525 F.2d 113, then it would seem that the lower Court's injunction at most should apply only in the AFDC-FC cases where there is federal financial participation.

The second question that arises is whether the hearing provisions of 45 C.F.R. 205.10 and 45 C.F.R. 228.14 should apply in the fact situation present in this civil action; and if they do apply, how extensive a hearing is necessary.

Because this case does not seem to deal with a question of credibility or disputed fact, but one of law, it would seem that the maximum type of hearing before termination would be where the hearing officer would decide at the time of hearing if the sole issue is "one of state or federal law or policy..." pursuant to 45 C.F.R. 205.10(a)(6)(i)(A). If the hearing officer found this to be true, the plaintiff would have had all the pre-termination hearing to which he would be entitled. Schneider, supra, page 919.

Defendants claim even this seems to be an unnecessary burden on the state. This Court should note that

42 U.S.C. 602(a)(4) was passed in its present form in 1950 [Act. August 20, 1950, Sec. 321(a), (b)]. There was no contemporaneous interpretation by the federal agency responsible for administering this statute for over twenty (20) years that 602(a)(4) entitled any recipient to anything more than a post-termination hearing limited to complete termination of benefits on failure to act with reasonable promptness.

The present regulation on hearings specifically states that it is based on Goldberg [45 C.F.R. 205.10 (a)(1)(ii)], and there is no question, because 602(a)(4) never changed nor had a contemporaneous interpretation, that a Court in 1977 must give the same deference to that federal regulation as it was given when Goldberg v. Kelly was the only Supreme Court interpretation. In fact, defendants believe that if the present Supreme Court completely overruled Goldberg in all its aspects, one could assume that the entire pre-termination evidentiary hearing scheme of 45 C.F.R. 205.10 would probably not be valid.

The present case before the Court presents a stronger reason for no hearing at all being required then in those

cases which illustrate 45 C.F.R. 205.10(a)(5) which states in part "a hearing need not be granted when either state or federal law require automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation". Rochester v. Ingram, 337 F.Supp. 350 (1972); Merriweather v. Burson, 325 F.Supp. 709 (1970) and Provost v. Betit, 326 F.Supp. 920 (1971) which dealt with pre-termination hearings only.

In the cases cited above, AFDC benefits were being lowered; in the present case, plaintiffs are being moved from a foster care benefit level to the same level of AFDC benefits that every family of six (6), who lives in New Haven County, receives. There is no lowering of these benefits and there is no question of credibility or factual dispute to be determined.

In Siletti v. New York City Employees' Retirement System, 401 F.Supp. 162, 167 (1975) concerning a reasonably analogous situation, the Court allowed no hearing either before or after the denial of benefits.

Although it is true that the defendants did not give the plaintiffs formal, written notice of the change from foster care benefits to AFDC benefits, this failure should not be used artificially against them. It is undisputed that defendants' Social Worker Tina Dixon personally went out to see the foster mother to tell her of the Superior Court decision and gave her the reason why foster care benefits would no longer be available. At that time, the plaintiff was also told to apply for AFDC benefits (Appendix, Pages 49a - 50a).

The plaintiffs' psychiatric social worker, who is the next friend in this present civil action, was told the same story on January 13, 1976. (Appendix, Page 49a) When a request for a delay was made for the change over to AFDC, it was granted. (Appendix, Page 49a) As a result, the plaintiffs were able to stay on foster care from December 3, 1975 until May 15, 1976, before they started receiving AFDC benefits.

The Court, on page 8 of its Ruling, seemed perturbed about their being "an unexplained manipulation of the plaintiffs' welfare benefits" which "should not be countenanced". The explanation in the previous paragraph, all taken from undisputed testimony, indicates that the defendant leaned over backwards to help the plaintiffs. Would there have been no unexplained manipulation if the defendant had sent "adequate" notice pursuant to 205.10(a)(4)(i)(B) on December 4, 1975, the day after the Superior Court's decision and, after seven (7) days pursuant to 205.10(a)(6)(i)(A) made a determination at the hearing that the sole issue was one of state or federal law or policy and then immediately removed the plaintiffs.

III

FOR PURPOSES OF A PRELIMINARY INJUNCTION, THERE SEEMS TO BE A GREATER LIKELIHOOD OF HARM TO THE DEFENDANTS THAN TO THE PLAINTIFFS.

Except for some claimed vague psychological harm to the plaintiffs, caused by a feeling of insecurity,

with this claim of psychological harm completely unsupported by any competent medical testimony, there was no other testimony presented by the plaintiffs to show any real injury that would be suffered by the plaintiffs, or the class they represent, while waiting for ninety (90) days for a post-termination fair hearing decision.

Although employees of the employer Maloney did not at first give the plaintiffs the post-termination fair hearing to which they were entitled pursuant to Section 17-2a of the Connecticut General Statutes, there is no question that they were entitled to one.

If the plaintiffs, or the class they represent, are successful in a post-termination fair hearing appeal, or any judicial appeal from the fair hearing pursuant to Section 17-2b of the Connecticut General Statutes, they are entitled to be reimbursed for any financial loss resulting from the change of their status from foster care to AFDC. However, the facts disclose no real injury.

In the Complaint filed in Court on June 14, 1976, after the plaintiffs had come on AFDC, it was judicially admitted in paragraph 16 that the plaintiffs were thriving and that there was no plan to change their living situation. (Appendix, page 5a) In an Amended Complaint filed June 25, 1976, the plaintiffs in paragraph 20 admitted that they were making good progress and that no change of their living situation was planned. (Appendix, page 10a)

Most importantly, the trial court in its ruling made a specific finding that none of the plaintiff's children had been "deprived of essential food, clothing or shelter...." (Appendix, page 28a) There was a finding by the court that the children would be deprived of school trips (Appendix, page 28a-29a), but the testimony by the foster-mother aunt not only did not support this finding but was exactly to the opposite. (Appendix, page 52a) There was a further finding by the Court that the aunt testified "that she is unable ...to send them on...summer vacations." (Appendix, page 29a) This finding was incorrect in that the aunt never testified as to this. It was Mrs.

Phillips who made a statement in discussing a possibility of what might occur in the future. (Appendix, page 52a)

Even if the change from foster care payments to AFDC had actually deprived the children of a summer vacation, a school trip, and some clothes, and gave them some feeling of insecurity, is this the type of irreparable harm contemplated as the basis for a preliminary injunction in a civil rights action pursuant to 1983?

The defendants think that this Court can take judicial notice that during this period of general inflation, and with the poor employment picture in the State of Connecticut, that many children, who are not on public assistance programs, are going without the same items and feeling some sense of insecurity. However, the defendants can find no cases either in federal or state courts where injunctive relief has been given for these inconsequential losses. This should be particularly true in this case where the plaintiffs can be made whole if they prevail in the post-termination fair hearing procedure.

On the other hand, the plaintiffs, and the class they represent, will probably be judgment proof if the defendant prevails on the question of whether or not they were wrongfully changed from foster care to AFDC. This problem for the defendants is heightened by the fact that the Court in its preliminary injunction order included the fully State financed foster care program as well as the AFDC-FC program, and in the former, the State gets no reimbursement from any federal grant. As a result, the entire loss falls on the State.

In balancing the equities, plus the probable lack of success on the merits, it would seem that the hardships fall more heavily on the defendants.

CONCLUSION

The defendants respectfully request that the preliminary injunction be terminated.

Respectfully submitted,

Francis J. MacGregor
Assistant Attorney General

2-22 Mail

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

RENE SOCKWELL, A MINOR, ET AL	)	
Plaintiff-Appellees	)	CIVIL ACTION NO: 76-7634
v.	)	
FRANCIS MALONEY, ET AL	)	February 18, 1977
Defendant-Appelllants	)	

CERTIFICATION

This is to certify that on the 18th day of February, 1977, two copies of the Brief of Appellants and one copy of the Joint Appendix was mailed to:

Edward Mattison, Esq.
Technical Assistance Project
495 Orange Street
New Haven, Connecticut 06511

Alice Leonard, Esq.
New Haven Legal Assistance Association
184 Dixwell Avenue
New Haven, Connecticut 06511

Francis J. MacGregor
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06118